Noteworthy Decision Summary

Decision: WCAT-2005-00527 **Panel:** Heather McDonald **Decision Date:** January 31, 2005

Stay of a decision – Policy Item #5.40 of the WCAT Manual of Rules of Practice and Procedure – Sections 115 and 244 of the Workers Compensation Act – Section 20.73 of the Occupational Health and Safety Regulation

This decision is noteworthy as an example of the analysis used to determine whether to grant a stay pending an appeal under policy item #5.40 of the WCAT *Manual of Rules of Practice and Procedure* (MRPP) and section 244 of the *Workers Compensation Act* (Act).

The Review Division of the Workers' Compensation Board (Review Division) imposed an administrative penalty on an employer for contravention of the fall protection provisions of the *Occupational Health and Safety Regulation,* and failure to comply with section 115 of the Act to ensure the safety of its workers. The employer appealed and, pursuant to section 244 of the Act, requested a stay of the Review Division's decision, pending a decision on the merits of the appeal.

The factors to consider in deciding whether to grant a stay are set out in policy item #5.40 of the MRPP, and are similar to the criteria used under the common law. Section 244 says that unless WCAT directs otherwise, a notice of appeal does not operate as a stay of the decision under appeal. Given the purpose of Part 3 of the Act, the panel was satisfied that workplace safety should be a critical consideration in the matter. The wording in section 244, the onus that the MRPP places on the party requesting the stay to provide reasons or risk summary dismissal of its request, and comments from courts in the case law indicate that a stay of proceedings is an extraordinary remedy. WCAT will not grant a stay unless the applicant requesting the stay provides sufficient reasons justifying a special exercise of the tribunal's discretion to temporarily halt the lawful effect of a Board decision or order, pending the outcome of the merits of an appeal.

With respect to the first factor in item #5.40, the panel was satisfied that the employer's appeal was not frivolous and that it raised serious issues to be heard. In regard to the second factor, the employer's assertion that paying the penalty would "all but wipe out" its corporate existence was not supported by evidence and was insufficient to establish irreparable harm. The granting of a stay is an extraordinary remedy that will require evidence beyond assertions of financial hardship or harm if a stay is not granted. The third factor involves consideration of the employer's financial considerations and other factors, including workers' safety in the workplace and the public interest in ensuring safe workplaces by way of compliance with the Act and Regulation. The panel found that the Board's interests in protecting worker safety and upholding the public interest outweighed the employer's statements about the degree and nature of harm it would incur if a stay was denied. As for the fourth factor, it did not appear that there was an immediate danger to worker safety at the employer's workplace if a stay was granted. However, considering the Act and Regulation's goals of promoting occupational health and safety, and noting that a stay is an extraordinary remedy, to grant a stay in less than compelling circumstances would undermine the enforcement system's goals of protecting worker safety. On balance, the panel found that the employer did not establish sufficient reasons for the granting of a stay pending its appeal to WCAT. The employer's request for a stay of the Review Division decision was denied.

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Panel: Heather McDonald, Vice Chair

Introduction

The employer operates a construction company. The employer is appealing a July 21, 2004 decision of a review officer in the Review Division of the Workers' Compensation Board (Board). In his decision, the review officer varied an earlier Board decision dated December 22, 2003 that imposed an administrative penalty of $7,585.62 against the employer. The review officer found that the employer had contravened section 20.73 of the *Occupational Health and Safety Regulation* (Regulation) and section 115(1)(a)(i) of the *Workers Compensation Act* (Act). Section 20.73 of the Regulation provides that fall protection as specified in the regulatory requirements must be used if work is being done on a roof from which a fall of ten feet or more may occur, or if a fall from a lesser height may involve an unusual risk of injury. Section 115(1)(a)(i) of the Act states that every employer must ensure the health and safety of all workers working for that employer.

The review officer concluded that the circumstances made it appropriate to impose an administrative penalty against the employer. He also found it appropriate to vary upward the amount of the basic penalty the Board had initially proposed. The review officer varied the basic penalty amount of $5,833.55 upward by the 30% for a total penalty amount of $7,583.62. This was $2.00 less than the penalty imposed by the December 22, 2003 Board decision.

In its notice of appeal to the Workers' Compensation Appeal Tribunal (WCAT), the employer stated that it disagreed with the Board orders finding violations of the Act and Regulation. As well, the employer disagreed with the Review Decision's decision to impose an administrative penalty. Further, the employer requested WCAT to stay the review officer's July 21, 2004 decision, pending a decision on the merits of the appeal.

This decision deals with the employer's request for a stay of the review officer's decision, and not the merits of the employer's appeal.

There is one jurisdictional issue which I will address at this point. In a letter dated December 17, 2004 to the employer, a WCAT assessment officer advised the employer that:

> The contravention orders mentioned are not appealable to WCAT. If you wish to pursue this matter, it is open to you to request a review by the

> Review Division with respect to the contravention orders referred to on page 7 of [the review officer's] decision.

In fact, pursuant to section 239(2)(e)(i) of the Act, an employer may appeal an order made under Part 3 if the Board relied upon the order to impose an administrative penalty under section 196(1) of the Act. In this case, the employer is entitled to appeal to WCAT the review officer's decision that "both orders were appropriate," referring to the findings of the Board safety order in those orders that the employer had contravened section 115(1)(a)(i) of the Act and section 20.73 of the Regulation. Those orders formed the basis for the Board's decision to impose the administrative penalty against the employer. Therefore it is unnecessary for the employer to request a review by the Review Division of the orders in question that formed the basis for the Board's penalty proceedings. In the proceedings dealing with the merits of the employer's appeal to WCAT, the employer may address the validity of the findings that it contravened section 20.73 of the Regulation and section 115(1)(a)(i) of the Act.

To repeat, this decision deals only with the employer's request for a stay of the Review Division's July 21, 2004 decision.

Issue(s)

Should WCAT grant the employer's request for a stay of the review officer's July 21, 2004 decision?

Procedural Matters and Jurisdiction

The employer represented itself in its request for a stay. The employer provided a brief written submission in support of its stay request.

I have decided that the employer's request for a stay may be decided on the basis of the file documentation and the employer's submission. An oral hearing is not necessary to decide the stay issue. I note that in its notice of appeal, the employer has requested an oral hearing. The issue of an oral hearing for the merits of the appeal can be dealt with by the panel assigned to deal with the merits.

Section 239(1) of the Act provides a right of appeal to WCAT from a decision of a review officer in the Board's Review Division. Section 244 of the Act gives WCAT authority to grant a stay of a Board officer's decision under appeal to WCAT.

Section 244 states:

> *Unless the appeal tribunal orders otherwise*, the filing of a notice of appeal under section 242 does not operate as a stay or affect the operation of the decision or order under appeal.
>
> [Italic emphasis added]

Thus my jurisdiction in these proceedings arises under sections 239 and 244 of the Act.

Applicable Law and Practice Regarding Stays of Decisions

Section 5.40 of WCAT's *Manual of Rules of Practices and Procedures* (MRPP) deals with requests for stays of decisions under appeal to WCAT. With respect to the criteria for granting a stay, section 5.40 of the MRPP states as follows:

> Panels will consider the following factors in determining whether to issue a stay:
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> (a) whether the appeal, on its face, appears to have merit;
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> (b) whether the applicant would suffer serious irreparable harm if the stay were not granted (for example, loss of a business);
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> (c) which party would suffer greater harm or prejudice from granting or denying a stay; and
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> (d) in the context of occupational health and safety, whether the granting of a stay would endanger worker safety.
>
> This list is not exhaustive, and other factors may be taken into account. An application for a stay will generally be dealt with as a preliminary matter on the basis of written submissions. If no particulars or reasons are provided with the request, the request for a stay will not be considered.

The factors described in section 5.40 of the MRPP to consider in deciding whether it would be appropriate to grant a stay are similar to the common law criteria for issuing a stay outlined by the Supreme Court of Canada in *Manitoba (Attorney-General) v. Metropolitan Stores Ltd.,* [1987] 1 S.C.R. 110, and *RJR Macdonald Inc. v. Canada (Attorney-General*) [1994] 1 S.C.R. 311. The Court in those cases noted that a stay of proceedings and an interlocutory injunction are remedies of the same nature and, in the absence of statutory language to the contrary, should be governed by the same tests. The Court also affirmed the principle that a stay is an extraordinary remedy.

The language in section 244 of the Act ("unless the appeal tribunal orders otherwise") is essentially the same as the language afforded the former Appeal Division to grant a stay by section 210 of the Act, before the legislation was amended on March 3, 2003 to replace the Appeal Division by establishing WCAT. The factors described in section 5.40 of the MRPP are also very similar to the factors that were considered by the Appeal Division under *Decision No. 33* [17 W.C.R. D-7] in deciding whether to grant a stay of a decision under appeal. A substantive difference was that, in the context of occupational health and safety, the Appeal Division was to give paramount consideration to "worker safety" as a factor. In section 5.40 of the MRPP, worker safety is one factor for WCAT to consider in the context of occupational health and safety, but the MRPP guideline does not expressly emphasize it to be the most important consideration. Given, however, that the purpose of Part 3 of the Act is to "benefit all citizens of British Columbia by promoting occupational health and safety and protecting workers and other persons present at workplaces from work related risks to their health and safety," I am satisfied that workplace safety is still a critical consideration in deciding whether or not to grant a stay of a decision appealed to WCAT.

Section 244 of the Act says that unless WCAT directs otherwise, a notice of appeal does not operate as a stay of the decision under appeal. Section 5.40 of the MRPP requires that a party requesting a stay provide a written submission in support of its request and if there are no reasons or particulars to support the request, WCAT will summarily dismiss the request for a stay. I have considered the wording of the section 244, the onus that the MRPP places on the party requesting the stay to provide reasons or risk summary dismissal of its request, and the Supreme Court of Canada's comments in the case law earlier cited. Those considerations indicate that, like the granting of an interlocutory injunction, a stay of proceedings is an extraordinary remedy. WCAT will not grant a stay unless the applicant requesting the stay provides sufficient reasons justifying a special exercise of the tribunal's discretion to temporarily halt, pending the outcome of the merits of an appeal, the lawful effect of a Board decision or order.

Background to the Employer's Request for a Stay

The background leading to the Board's imposition of an administrative penalty, and the review officer's decision to confirm the penalty, is set out in summary fashion in the introduction to this decision.

In its written submission requesting a stay of the review officer's decision, the employer stated as follows:

1. I am confident I will be successful in the Appeal process, at least to the point of having the amount reduced.

2. [The employer] has not been active for the past few months, cash flow is low and there isn't $7,500.00 in the bank account to pay the penalty.

3. Having to pay the penalty at this time would all but wipe out my company but I think WCB can wait until this is settled without suffering too much.

4. Granting this stay is not going to endanger employee safety at this time because I don't have any employees.

Reasons and Findings

In this case I have decided not to grant a stay of the Review Division's July 21, 2004 decision. In my view the circumstances do not justify granting a stay of the administrative penalty of $7,583.62.

With respect to the first consideration in section 5.40 of the MRPP in determining whether to grant a stay, I have reviewed the employer's preliminary written submission on the merits of the appeal. I am satisfied that the employer's appeal is not frivolous and that it raises serious issues to be heard.

Turning to the second consideration, the MRPP refers to "loss of a business" as the type of harm envisioned in terms of "serious irreparable harm" if a stay were not granted. In this case the employer has stated that its cash flow is low, there are not sufficient funds in its bank account to pay the penalty, and that paying the penalty would "all but wipe out" the employer's corporate existence. The employer's assertions are not supported by financial statements or other documentary evidence. Its assertions are not, in my view, sufficient to establish irreparable harm. The employer has been in business for eleven years. The evidence does not satisfy me that it will be unable to obtain adequate operating credit such that it would be unable to pay the Board penalty as well as other financial obligations. It is important for employers to appreciate that the granting of a stay is an extraordinary remedy that will require evidence beyond assertions of financial hardship or harm if WCAT does not grant a stay.

The third MRPP consideration is the issue of which party would suffer greater harm or prejudice from granting or denying a stay. The consideration does not only involve the employer's financial considerations. There are other factors which can be considered in assessing whether the balance of convenience favours the appellant or the Board, including workers' safety in the workplace and the public interest in ensuring safe workplaces by way of compliance with the Act and Regulation. The Act and Regulation set out the Board's enforcement system, with administrative penalties as an important component of enforcement. There is a public interest to be upheld by the Board, and there is a public interest in affirming the validity of the enforcement system. If penalties are stayed without adequate reasons, the validity of the system may be undermined.

In this case, both the Compliance Section of the Board's Prevention Division and the Review Division found the employer in violation of the Regulation's fall protection provisions and the Act's obligation on an employer to ensure the safety of its workers. I am satisfied that the Board's interests in protecting worker safety and upholding the public interest outweigh the employer's brief statements regarding financial hardship that it does not support with documentary evidence about the degree and irreparable nature of the harm.

The final MRPP consideration is whether granting a stay would endanger worker safety. In the immediate context of the employer's workplace, and given the advice that the employer currently has no employees, I agree with the employer that there would not seem to be an immediate danger to worker safety at the employer's workplace if I were to grant a stay. However, considering the broader context of the Act and Regulation's goals of promoting occupational health and safety, and noting that a stay is an extraordinary remedy, in my view to grant a stay in less than compelling circumstances would be to undermine the enforcement system's goals of protecting worker safety.

On balance, for the reasons set out above, I find that the employer has not established sufficient reasons for the granting of a stay pending its appeal to WCAT.

Conclusion

I deny the employer's request for a stay of the July 21, 2004 decision of the Review Division. The WCAT Registry will now process the employer's appeal so that it can be assigned to a panel to deal with the issues on the merits of the appeal.

Heather McDonald
Vice Chair

HM/hb

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